

1996

Stephen E. Brendle, Richard L. Maires v. The City of Draper : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael Z. Hayes, Esq.; Mazuran & Hayes.

Mark E. Wilkey, Gregory D. Phillips; Kimball, Parr, Waddoups, Brown & Gee; attorneys.

Recommended Citation

Brief of Appellant, *Stephen E. Brendle, Richard L. Maires v. The City of Draper*, No. 960296 (Utah Court of Appeals, 1996).
https://digitalcommons.law.byu.edu/byu_ca2/236

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50
.A10

DOCKET NO. 960296-CA

IN THE COURT OF APPEALS

STATE OF UTAH

STEPHEN E. BRENDLE, an individual
and RICHARD L. MAIRES, an
individual,

Plaintiffs/Appellants,

v.

THE CITY OF DRAPER,
a Utah municipality,

Defendant/Appellee.

:
:
:
:
:
: Appeals Court
: No. 960296-CA
:
:
:
: Trial Court
: No. 95 0904251 AA
:
: Priority No. 15
:

BRIEF OF APPELLANT STEPHEN E. BRENDLE

**Appeal from the Third Judicial District Court
for Salt Lake County, State of Utah**

The Honorable Anne M. Stirba

Mark E. Wilkey (4167)
Gregory D. Phillips (4645)
KIMBALL, PARR, WADDCUPS, BROWN & GEE
Attorneys for Appellant
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: 801-532-7840

Michael Z. Hayes, Esq.
Mazuran & Hayes
1245 East Brickyard Road, #250
Salt Lake City, Utah 84106

FILED
Utah Court of Appeals

SEP 17 1996

Marilyn M. Branch
Clerk of the Court

IN THE COURT OF APPEALS

STATE OF UTAH

STEPHEN E. BRENDLE, an individual	:	
and RICHARD L. MAIRES, an	:	
individual,	:	
	:	
Plaintiffs/Appellants,	:	Appeals Court
	:	No. 960296-CA
v.	:	
	:	
THE CITY OF DRAPER,	:	Trial Court
a Utah municipality,	:	No. 95 0904251 AA
	:	
Defendant/Appellee.	:	Priority No. 15
	:	

BRIEF OF APPELLANT STEPHEN E. BRENDLE

**Appeal from the Third Judicial District Court
for Salt Lake County, State of Utah**

The Honorable Anne M. Stirba

Mark E. Wilkey (4167)
Gregory D. Phillips (4645)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
Attorneys for Appellant
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: 801-532-7840

Michael Z. Hayes, Esq.
Mazuran & Hayes
1245 East Brickyard Road, #250
Salt Lake City, Utah 84106

TABLE OF CONTENTS

JURISDICTION OF THE COURT OF APPEALS	1
ISSUES PRESENTED BY THIS APPEAL	1
STATEMENT OF THE CASE	6
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. Draper lacked jurisdiction to reconsider or review the April 20, 1995 decision by the Draper Planning Commission after the expiration of the statutory period for appeal of that decision.	16
II. The trial court erred in ruling that Owners had not obtained a vested right to proceed with the construction of a home on their Lot after they had obtained a valid building permit and secured approval from the Draper Planning Commission and the time for all appeals from said decision had expired.	21
III. Draper equitably estopped from halting Owner's use and enjoyment of their property by Appellants' detrimental reliance on the permission to proceed with construction that was granted by the Draper City Planning Commission.	23
IV. The trial court erred in dismissing Owners' constitutional claims for uncompensated takings under the Utah and federal constitutions, their claims under Utah's declaratory relief act, under 42 U.S.C. § 1983, and for denial of equal protection of the laws.	24
A. <u>Owners have a direct right of action under Article I § 22 of the Utah Constitution.</u>	26

B.	<u>Owners are entitled to seek Declaratory and/or injunctive relief.</u>	28
C.	<u>Owners also have stated valid claims under the Fifth and Fourteenth Amendments to the United States Constitution.</u>	28
D.	<u>Owners have stated a claim for relief under 42 U.S.C. § 1983.</u>	29
V.	The trial court erred in ruling that Draper City Council's reversal of the earlier decision of the Draper Planning Commission was not arbitrary, capricious or illegal in light of the Council's failure to address the appropriate factors specified by the Draper City's Hillside Ordinance.	30
VI.	The decision of the Draper City Council to reverse the earlier decision of the Draper City Planning Commission based on "public clamor" rather than a consideration of the appropriate decision-making factors.	32
VII.	The trial court erred, in light of its express finding that the Draper City Planning Commission granted permission to Appellants to proceed with construction on the basis of a mutual mistake of fact (with no bad faith or deceit on the part of Appellants) in determining that Draper had the authority and right to reconsider the planning commission's earlier action.	33
CONCLUSION		36

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Bello v. Walker</u> , 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 868 (1988)	29
<u>First English Evangelical Lutheran Church v. Los Angeles County</u> , 107 S. Ct. 2378 (1987) . . .	28
<u>Jacobs Visconsi & Jacobs v. City of Lawrence</u> , 927 F.2d 1111 (10th Cir. 1991)	29
<u>Monell v. New York City Department of Social Services</u> , 436 U.S. 658 (1978)	29

STATE CASES

<u>Albretson v. Judd</u> ., 709 P.2d 347 (Utah 1985)	19
<u>Aranosian Oil Co. v. City of Portsmouth</u> , 612 A.2d 357 (N.H. 1992)	35
<u>Christensen v. Lelis Automatic Transmission Service, Inc.</u> , 467 P.2d 605 (Utah 1970)	25
<u>Colman v. Utah State Land Board</u> , 795 P.2d 622 (Utah 1990)	26
<u>Commonwealth v. Flynn</u> , 344 A.2d 720 (Comm. Ct. Pa. 1975)	34, 35
<u>Davis County v. Clearfield City</u> , 756 P.2d 704 (Ut. App. 1988)	4, 5, 31, 32
<u>In re Estate of Ratliff</u> , 431 P.2d 571 (1967)	19
<u>Hansen v. Department of Finance Institutions</u> , 858 P.2d 184 (Utah App. 1993)	3, 4
<u>Kasco Services Corp. v. Benson</u> , 831 P.2d 86 (Utah 1993)	2, 3, 4, 6
<u>Mounteer v. Utah Power & Light Co.</u> , 823 P.2d 1055 (Utah 1991)	26

<u>Patterson v. Utah County Board of Adjustment,</u> 893 P.2d 602	30
<u>Robinson & Wells, P.C. v. Warren,</u> 669 P.2d 844 (Utah 1983)	19
<u>Russell v. Standard Corp.,</u> 898 P.2d 263 (Utah 1995)	25, 26, 27
<u>Sandy City v. Salt Lake County,</u> 794 P.2d 482 (Utah App. 1990)	24
<u>St. Benedict's Development Co. v.</u> <u>St. Benedict's Hospital,</u> 811 P.2d 194 (Utah 1991)	4, 25, 27
<u>Stucker v. Summit County,</u> 870 P.2d 283 (Ut. App. 1994)	23
<u>Technomedical Labs, Inc. v. Utah Securities Division,</u> 744 P.2d 320 (Ut. App. 1987)	4, 5
<u>Thurston v. Cache County,</u> 626 P.2d 440 (Utah 1981)	28, 32
<u>United Park City Mines Co. v.</u> <u>Greater Park City Co.,</u> 870 P.2d 880 (Utah 1993)	2, 3, 4, 6
<u>Utah County v. Young,</u> 615 P.2d 1265 (Utah 1980)	23
<u>Utah Steel & Iron co. V. Bosch,</u> 475 P.2d 1019 (Utah 1970)	26
<u>Western Land Equities. Inc. v.</u> <u>City of Logan,</u> 617 P.2d 388 (Utah 1980)	14, 21, 22

FEDERAL STATUTES

42 U.S.C. § 1983	3, 4, 24, 29, 30
----------------------------	------------------

STATE STATUTES

Utah Code Ann. § 10-9-1001	4, 13, 24, 26
--------------------------------------	---------------

Plaintiffs and Appellants Stephen E. Brendle and Richard L. Maires (collectively referred to herein as "Lot Owners" or "Owners") hereby submit, pursuant to Rules 24 and 26 of the Utah Rules of Appellate Procedure, their opening brief with respect to the district court's Ruling and Order upholding the decision of the Draper City Council to prohibit Owners from constructing a home on a lot they own in Draper and the trial court's dismissal of Owner's other claims pursuant to a Motion to Dismiss filed by Defendant City of Draper (hereinafter "Draper.")

JURISDICTION OF THE COURT OF APPEALS

This is an appeal of right taken from a final Ruling and Order entered after a non-jury trial and from the district court's ruling on Draper's Motion to Dismiss. No post-judgment motions were filed by either party. The final Ruling and Order appealed from was entered on November 27, 1995. Owners filed a timely Notice of Appeal on December 22, 1995. Pursuant to Utah Code Ann. § 78-2a-3(2)(j) has been "poured over" to the Court of Appeals.

ISSUES PRESENTED BY THIS APPEAL

1. Did the Draper City Council lack jurisdiction to review the earlier approval by the Draper City Planning Commission of Owners' construction of a home on their Lot after the expiration of the statutory period for appeal from

the planning commission's decision to allow construction to proceed?

(a) Standard of review: Whether the expiration of an appeals period deprives a decision making entity from jurisdiction to further consider a matter is a conclusion of law. [cite], as such the trial court's decision is reviewed for correctness. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1993).

(b) Issue preserved for appeal: [R. at 37-39; 84-85]

2. Did the trial court err in determining that Owners had not obtained a vested right to proceed with the construction of a home on their lot after the Appellants had obtained a valid building permit and secured approval from the Draper City Planning Commission and the time for all appeals from said decision had expired?

(a) Standard of review: The trial court ruled, as a conclusion of law, that Owners had not obtained a vested right to proceed with development of their Lot. See [R. at 224]. Such conclusions of law are reviewed for correctness.. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1993).

(b) Issue preserved for appeal: [R. at 12-13, 39-40, 224].

3. Is Draper equitably estopped from halting Owner's use and enjoyment of their property by Appellants' detrimental reliance on the permission to proceed with construction that was granted by the Draper City Planning Commission, in that Owners have, on the basis of a validly issued building permit, began construction, including the excavation and pouring of a foundation for their home, at great expense to Owners?

(a) Standard of review: The trial court ruled, as a conclusion of law, that Draper was not equitably estopped from enforcing its zoning ordinances to stop Owners' construction on their Lot. See [R. at 224]. This conclusion of law is reviewed for correctness.. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1993).

(b) Issue preserved for appeal: [R. at 13-14, 39-40, 224].

4. Did the trial court err in dismissing Owners' constitutional claims for uncompensated takings under the Utah and federal constitutions, their claims under Utah's declaratory relief act, under 42 U.S.C. § 1983, and for denial of equal protection of the laws?

(a) Standard of review: Whether the dismissal of a claim pursuant to a Rule 12(b)(6) motion is proper is a

conclusion of law. St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991); Hansen v. Dept. of Fin. Institutions, 858 P.2d 184, 186 (Utah App. 1993). Such conclusions of law are reviewed for correctness.. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1993).

(b) Issue preserved for appeal: [R. at 127-32].

5. Was the decision of the Draper City Council to reverse the earlier decision of the Draper City Planning Commission to allow Owners to proceed with construction on their lot arbitrary, capricious or illegal in light of its failure to address the appropriate factors specified by the Draper City's Hillside Ordinance?

(a) Standard of review: The Court of Appeals, in reviewing the trial court's review of the zoning decisions of Draper "owes no particular deference to the trial court's review of a particular agency action." Technomedical Labs, Inc. v. Utah Securities Div., 744 P.2d 320 (Ut. App. 1987). To the extent the trial court's decision is based upon the testimony of witnesses, the court of appeals must defer to the trial court's advantaged position to hear, weigh and evaluate the testimony of the parties. Davis County v. Clearfield City, 756 P.2d 704 (Ut. App. 1988).

(b) Issue preserved for appeal: [R. at 40-41; 357].

6. Was the decision of the Draper City Council to reverse the earlier decision of the Draper City Planning Commission based on "public clamor" rather than a consideration of the appropriate decision-making factors.

(a) Standard of review: The Court of Appeals, in reviewing the trial court's review of the zoning decisions of Draper "owes no particular deference to the trial court's review of a particular agency action." Technomedical Labs, Inc. v. Utah Securities Div., 744 P.2d 320 (Ut. App. 1987). To the extent the trial court's decision is based upon the testimony of witnesses, the court of appeals must defer to the trial court's advantaged position to hear, weigh and evaluate the testimony of the parties. Davis County v. Clearfield City, 756 P.2d 704 (Ut. App. 1988).

(b) Issue preserved for appeal: [R. at 358-59].

7. Did the trial court err, in light of its express finding that the Draper City Planning Commission granted permission to Appellants to proceed with construction on the basis of a mutual mistake of fact (with no bad faith or deceit on the part of Appellants) in determining that Draper had the authority and right to reconsider the planning commission's earlier action and that Owners therefore did not obtain a vested right to proceed with the construction of their home and Draper was not therefore equitably estopped from halting Owners' construction of the home?

(a) Standard of review: The trial court ruled, as a finding of fact that there had been a mutual mistake of fact regarding the lack of opposition to Owners' continued development of their Lot and that the decision of the Draper Planning Commission to allow such construction was based on that mutual mistake (which came about without any bad faith on the part of Owners.) See [R at 223-24]. Based on those findings of fact, the trial court, held as conclusions of law, that Draper could re-open the decision after the expiration of the appeals period, that Owners had not acquired vested rights to proceed with construction and that Draper was not equitably estopped from enforcing its zoning ordinances to stop Owners' construction on their Lot. See [R. at 224]. These conclusions of law are reviewed for correctness.. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1993).

(b) Issue preserved for appeal: [R. at 360-62].

STATEMENT OF THE CASE

This is an appeal from the decision of the trial court upholding the decision of the Draper City Council to stop construction of a residence on a subdivision lot owned by Owners after Owners had previously obtained a building permit and commenced construction of a home on the lot. After Draper's untimely reversal of its previously granted

authorization to Owners to proceed with construction on their lot, Owners commenced this judicial action asserting that: Draper lacked jurisdiction to reconsider its earlier action; that Owners had acquired a "vested right" to proceed with the construction of their home; that Draper was equitably estopped to prevent Owners' completion of the home they had commenced building on the basis of reasonable reliance on Draper's earlier decision; that the issuance of the "stop work" Order by Draper was arbitrary, capricious and illegal; and that Draper's actions violated Owners' constitutional rights under the "takings," "due process" and "equal protection" clauses of the United States and Utah Constitutions.

The trial court issued a ruling in response to Draper's Motion to Dismiss that Owners' Complaint would be treated as a "Petition for Review" and that the Court would therefore conduct an "appellate" review of Draper's actions. This ruling implicitly dismissed Owners' constitutional claims and limited the scope of Owners' rights at the evidentiary hearing. After taking evidence, the trial court issued a written Ruling and Order in which it held that Draper's actions were not arbitrary or capricious, that Draper had jurisdiction to revoke the prior authorization granted to Owners, that Owners had not obtained a vested right to proceed with the development on their lot and that Draper was not equitably estopped from halting Owners' building on their lot. Owners

filed this timely appeal from the trial court's final Ruling and Order.

STATEMENT OF FACTS

1. In April 1994, Owners entered into an Option Agreement to purchase Lot 304 in the Cove at Bear Canyon (the "Lot"). Ex. 1, [R. at 250-51].

2. The Lot is sloped and bordered on the upper (east) and lower (west) sides by streets in a platted subdivision. As originally platted, the Lot was intended to have a home constructed on the west end of the Lot facing the lower street. [R. at 252-53].

3. In constructing the lower street, however, the subdivision's developers made "cuts" into the lower end of the Lot that made the lower end impossibly steep and, as a practical matter, unbuildable. [R. at 252].

4. Because of these discrepancies between the subdivision plat and the actually constructed subdivision, Owners made their purchase of the Lot contingent upon receiving approval from Draper to locate a home on the upper end of the lot, facing east. Ex. 1; [R. at 251-52].

5. After an on-site inspection by the Draper City engineer, who "concurred" with the relocation of the home to the east end of the Lot, Owners obtained a building permit and authorization from Draper's planning and zoning commission to

proceed with construction on the east end of the Lot. [R. at 253]; Exs. 3 and 4.

6. In reliance on the building permit and permission to proceed with construction, Owners exercised the option and purchased the Lot for \$61,000. [R. at 262].

7. On April 27, 1994, Owners commenced construction of a luxury home on the Lot. Ex. 12.

8. In June 1994, however, Draper received complaints from owners of lots located on the eastern street (although not contiguous to, or even in sight of the Lot) that Owners' home might obstruct their views, and Draper City issued a "Stop Work" Order. [R. at 270-71].

9. At a hearing before the Draper Planning Commission, on June 13, 1994, the issuance of the "Stop Work" Order, was upheld. The basis for this decision was ostensibly the Draper Hillside Ordinance, which prohibited construction on slopes in excess of 30%. The opposing testimony presented at the hearing, however, focused on the views of the neighboring landowners and the amounts they had paid for their lots as opposed to the price paid by Owners. [R. at 270-72].

10. On August 23, 1994 Owners appealed the planning commission's decision to the Draper City Council. Once again certain neighbors objected on the grounds that their views might be obstructed. [R. at 74].

11. Having exhausted their administrative remedies, Owners filed a Petition for Review in the Third Judicial District Court of Salt Lake County, Civil No. 94 09059588A, on September 21, 1994. In a Ruling and Order dated April 18, 1995, the District Court determined that the actions of the Planning Commission and the City Council were not arbitrary and capricious. [R. at 74-75].

12. Following the District Court's ruling, Owners contacted the developer for the subdivision containing their Lot to discuss "trading" for another lot or obtaining a refund on their purchase of the "unbuildable" Lot. [R. at 272].

13. The developer informed Owners that he believed that with his assistance they could obtain approval from Draper to proceed with the construction of the house on the east end of the Lot. [R. at 273-74]; Ex. 9A.

14. Prior to the expiration of the period for appealing the District Court's determination, Plaintiffs asked the Planning Commission to reconsider its previous decision. Ex. 9A. After considering all of the factors relevant under the Hillside Ordinance, the Planning Commission voted on April 20, 1995, to allow Owners to proceed with the construction of the home on the east end of the Lot. Ex. 10A.

15. Under section 6-1-4(B) of the Land Use and Development Regulations of Draper City, an appeal from a decision of the Planning Commission "shall be filed in writing

with the City Recorder within fourteen (14) days of the Planning Commission's decision" Ex. 11.

16. No written appeal of the decision to allow Owners to proceed with construction on the Lot was filed with the Draper City Recorder within the fourteen-day period. [R. at 284].

17. In reliance on the April 20, 1995, decision of the Planning Commission and **after** expiration of the period for appeal, Owners incurred expenses in excess of \$50,000 in pouring the foundation for the home on the east end of the Lot. [R. at 289].

18. On or about June 1, 1995, however, Owners learned that a property owner on the eastern street had asked the Draper Planning Commission to reconsider its decision, despite the fact that Owners had poured their foundation and the period for appeal had expired. These objecting parties asserted that they had not received notice of the April 20, 1995 decision of the Draper Planning Commission. Ex. 13, [R. at 291].

19. Notwithstanding Plaintiffs' objection that the planning commission lacked jurisdiction to reconsider its earlier decision after the expiration of the appeals period, the Draper Planning Commission reheard the matter on June 8, 1995. On that date, the Planning Commission **again** voted to allow its earlier decision to allow building on the east end of the Lot to proceed. Ex. 10B.

20. An appeal was sought with the Draper City Council on June 9, 1995, and Owners again objected that Draper lacked jurisdiction to change the April 20 decision of the Planning Commission. Despite these objections, the City Council reversed the Planning Commission's decision to allow Owners to proceed with construction on the east end of their Lot. Ex. 10C.

21. In reaching this decision, the Council failed to address the relevant issues relevant to the Hillside Ordinance, basing its decision instead on irrelevant considerations such as the potential obstruction of neighbors' views and the relative prices paid for surrounding lots. Id.

22. On June 14, 1995, Draper City issued a "Stop Work" Order to Owners. Owners then filed this action in order to seek a conclusive judicial determination that Draper's "Stop Work" Order was arbitrary, capricious, and illegal, that it violated Owners' vested property right to proceed with the development of their property, that Draper lacked jurisdiction to issue the "Stop Work" Order after the expiration of the appeals period for the April 20, 1995 planning commission decision, that Draper was equitably estopped from halting Owners' construction efforts and that issuance of the "Stop Work" Order under these circumstances was a violation of Plaintiffs' constitutional rights protected by the Takings,

Due Process, and Equal Protection Clauses of the United States and Utah Constitutions. [R. at 298-99].

23. Draper filed a Motion to Dismiss in which it argued that Owners' Complaint must be construed as a "Petition for Review" under Utah Code Ann. § 10-9-1001 and that the trial court was therefore limited to determining whether Draper's land use decisions were "arbitrary, capricious or illegal." [R. at 72-79].

24. In a "Ruling" issued on September 27, 1995, the trial court held that "the Complaint should be treated as a "Petition for Review." [R. at 211-13]. Accordingly, Owners were limited in the scope of evidence they were allowed to present at trial and were not allowed to put on evidence relating to their constitutional claims. Id.

25. The trial court issued a final "Ruling and Order" on November 27, 1995, after having heard evidence at a one-day trial on October 12, 1995. In that Ruling and Order the Court found Draper's decision to stop the Owners' construction on their Lot was not arbitrary, capricious or illegal. The Court further held that there were no jurisdictional problems and that Owners had not obtained a "vested right" to proceed with construction and that Draper was not equitably estopped from halting Owners' construction on the Lot. [R. at 222-25].

26. Owners filed a timely Notice of Appeal on December 22, 1995. [R. at 226-27].

SUMMARY OF ARGUMENT

1. The Draper Planning Commission voted 5-1 on April 20, 1995 to allow Owners to proceed with construction of their home on the upper end of their Lot. The relaxant Draper Land Use Regulations require a written appeal of planning commission decisions to be filed with the City Recorder within fourteen days. No written appeal of the planning commission's decision was filed. After the expiration of the appeals period, Owners proceeded, at very substantial expense, to pour foundations for a luxury home at the upper end of their Lot. The Draper Planning Commission and City Council re-opened and reconsidered the permission granted on April 20, 1995 at meetings held on June 3 and June 13, 1995. Draper lacked jurisdiction, due to the expiration of the applicable appeals period, to re-open the issue.

2. By obtaining a building permit and permission from the Draper Planning Commission to build in an area in excess of 30% slope and by proceeding (after the expiration of all relaxant appeals periods) with construction on their home, Owners obtained a "vested right" to proceed with construction under the rule announced by the Utah Supreme Court in Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980).

3. Draper is equitably estopped from halting the Owners' construction of a home on their Lot after they had

reasonably and in good faith relied, to their substantial detriment, on the April 20, 1995 decision of the Draper Planning Commission by expending in excess of \$50,000 in pouring foundations at the upper end of their Lot.

4. Owners properly stated claims for relief, sufficient to withstand Draper's Motion to Dismiss, for the uncompensated taking of their property, for denial of equal protection, for declaratory and injunctive relief and for denial of their civil rights, which claims the trial court improperly dismissed without opportunity for plenary consideration.

5. The Draper City Council failed to consider the appropriate statutory factors in reaching its decision to overturn the previously issued permission for Owners to proceed with construction on the upper end of their Lot. Accordingly, Draper's action was "arbitrary and capricious" and should have been reversed by the trial court.

6. Draper's reversal of the earlier decision to allow Owners to proceed with construction of their home on the upper end of their Lot was predicated entirely on "public clamor" rather than legally sufficient bases for such a decision. For this reason too, Draper's decision was arbitrary and capricious and should have been overturned by the trial court.

7. The trial court incorrectly held that the mutual mistake of fact upon which the Draper Planning Commission relied in allowing Owners to proceed with construction on

their Lot was a legally sufficient basis to overcome the lack of jurisdiction for subsequent re-opening the issue, and that this mistake prevented Owners from obtaining a vested right to proceed with development and to assert that Draper was equitably estopped from halting their construction. Persuasive authorities from other jurisdictions indicate that where a land-owner has detrimentally relied, expended substantial sums of money in improving property, and acted in good faith on a mistaken zoning decision, that decision may not be re-opened or reversed.

ARGUMENT

- I. Draper lacked jurisdiction to reconsider or review the April 20, 1995 decision by the Draper Planning Commission after the expiration of the statutory period for appeal of that decision.

On April 20, 1995 the Draper Planning Commission properly considered all of the factors specified by the Draper Hillside Ordinance and voted 5-1 to allow Owners to proceed with building on the east end of the Lot.

Specifically, the minutes from that meeting reflect that the request was approved because:

[T]here will be no significant harm caused by building the home at the proposed location; the proposed modification will result in a more functional and improved plan; and there are no surrounding property owners who have different

expectations of the lot that would interfere with going ahead with the building¹

Ex. 10A at ¶ 7.4.

Under Section 6-1-4(B) of the Land Use and Development Regulations of Draper City, Ex. 11, any appeal from a decision of the planning commission "shall be filed in writing with the City Recorder within fourteen (14) days of the Planning Commission's Decision."² It is undisputed that no written appeal of the April 20, 1995 decision of the Draper Planning Commission to allow Owners to proceed with construction on their Lot was filed within the appeals time allowed by Draper statutes. It is further undisputed that **after** the expiration

¹ According to the Draper Hillside Ordinance, the three factors that need to be considered when application is made to building on slopes of 30% or more are:

- (1) No significant harm will result;
- (2) The proposed modification will result in a more functional and improved plan; and
- (3) The developer / builder agrees to comply with any conditions and requirements imposed by the Planning Commission to mitigate any adverse effects which may result from the proposed modification.

Section 9-15-4(a) Draper City Hillside Ordinance. Ex. 7. The planning commission's reference to expectations of surrounding lot owners was therefore improper. In context, however, it is clear that the April 20, 1995 decision was based on its consideration of the factors set forth in the Hillside Ordinance.

² There was some testimony at trial that the correct time for appeal under Draper's ordinances was actually thirty days. [R. at 387]. Even if that longer time period were used, it is undisputed that no written appeal of the Planning Commission's decision to allow Owners to proceed was filed within 30 days of the April 20, 1995 decision. *Id.*

of the appeals period for the April 20, 1995 decision, Owners incurred substantial additional expense by pouring the foundation for a home on the east end of the Lot.

Notwithstanding the lack of a timely written appeal, the Draper Planning Commission reheard the issue of Owners' construction on the east end of their Lot on June 8, 1996. Owners appeared in person and through counsel at that meeting and objected to Draper's lack of jurisdiction on the basis of the lack of a timely written appeal. The planning commission proceeded to reach the merits of the issue and **again** voted to approve construction at the east (upper) end of their Lot. On June 13, 1995 the Draper City Council met to consider, among other matters, an "appeal" from the decision of the planning commission on June 8, 1995 to allow Owners to proceed with the construction of a home on the Lot. Once again, Owners and their counsel appeared and objected to the lack of jurisdiction. The city council again ignored the jurisdictional defect created by the lack of a timely appeal and voted to reverse the planning commission's decision to allow Owners' construction on the east end of their Lot.

The jurisdictional defect caused by the lack of timely written appeal from the April 20, 1995 decision was briefed and argued to the trial court during the judicial review of Draper's actions. [R. at 37-38, 352-53]. The trial court specifically found, however, that "[t]he Draper City Planning

Commission and Draper City Council had jurisdiction to hear this matter." [R. at 225].

It has repeatedly been held that the policy of the law must be to encourage finality of decisions. Accordingly, delayed appeals or reconsideration of matters previously ruled upon are therefore not proper. See, e.g., Albretson v. Judd, 709 P.2d 347 (Utah 1985); Robinson & Wells, P.C. v. Warren, 669 P.2d 844 (Utah 1983); In re Estate of Ratliff, 431 P.2d 571 (1967). After the expiration of the appeals period established by Draper's ordinances, Owners had an absolute right to proceed with the development of their Lot. The fact that Owners relied to their detriment on the expiration of this appeals period in incurring substantial additional construction expenses makes the jurisdictional issue even more compelling. The trial court's ruling that Draper had jurisdiction to reconsider the April 20 decision after the expiration of the appeals period appears to be based on its finding that there had been "a clear mistake of fact (i.e., the lack of neighboring property owners [sic] objections)." [R. at 223-24]. Nowhere in the record nor in the Draper statutes, is there any support for this ruling. There is no question that the Court found that any misstatement by Owners on this point was made in good faith. At the time of the April 20, 1995 decision allowing them to proceed, Owners **had** been informed by the developer of the subdivision that there

was no objection to them building at the upper end of their lot and Owners so informed the Draper Planning Commission.

Certain property owners on the street above Owners' lot later asserted that this was incorrect and that they did have objections to Owners' request. There is no legal support, however, for the trial court's decision to exempt these owners from the requirement of filing a timely appeal under Draper's statutes. There is no requirement in either the Draper Hillside Ordinance or Draper's Land Use and Development Regulations, (or in the applicable provisions of the Utah Code) that a municipality or planning commission give notice to neighboring property owners of decisions. The planning commission meetings are public. Items on the agenda are publicly posted. That these non-contiguous "neighbors" did not learn of the decision to allow Owners to proceed with construction within the time allowed by Draper statutes for an appeal is certainly not Owners' fault. It does not justify the trial court's decision to ignore the lack of jurisdiction resulting from the absence of a timely written appeal.

The decisions of the Draper Planning Commission and City Council taken after the expiration of the appeals period in early May 1995 are void and illegal. On that basis alone the decision of the trial court to uphold the "Stop Work" Order issued by Draper must be reversed.

II. The trial court erred in ruling that Owners had not obtained a vested right to proceed with the construction of a home on their Lot after they had obtained a valid building permit and secured approval from the Draper Planning Commission and the time for all appeals from said decision had expired.

Plaintiffs obtained a valid building permit to build a home on the Lot on April 22, 1994. They obtained permission from the Draper City Planning Commission to build on the east end of the Lot on April 20, 1995. The appeal period for that decision expired 14 days later. By complying with Draper's procedures and ordinances and obtaining the necessary permits and authorizations, Plaintiffs acquired a "vested right" to proceed with the development of their property.

In Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980), the Utah Supreme Court explained need for a rule with regard to "vested rights" in the development of real property:

In our view the tests employed by most other jurisdictions tend to subject landowners to undue and even calamitous expense because of changing city councils or zoning boards or their dilatory action and to the unpredictable results of burdensome litigation. . . . The threat of denial of a permit at a late stage of development makes a developer vulnerable to shifting governmental policies and tempts him to manipulate the process by prematurely engaging in activities that would establish the substantial reliance required to vest his right to develop when inappropriate.

The economic waste that occurs when a project is halted after substantial costs have been incurred in its commencement is of not benefit either to the public or to landowners. . . .

Governmental powers should be exercised in a manner that is reasonable and, to the extent possible, predictable.

.

The above competing interests are best accommodated in our view by adopting the rule that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.

617 P.2d at 395-96 (emphasis added).

Exactly as described in the Western Land Equities decision, Owners have been subjected to calamitous expense and burdensome litigation and delay. They purchased their Lot in 1994. In 1995, relying in good faith on a properly issued building permit and authorization from the Draper Planning Commission (which was not appealed) they expended over \$100,000 in partially constructing a luxury home on that Lot. They have now been stopped for more than a year by a capricious vote of the Draper City Council. If this ruling stands, there will be huge economic waste. Owners will have expended more than \$100,000 to no useful end. The "lower" portion of the Lot is unbuildable. The "half-constructed" foundations are an eye-sore and, perhaps a danger to the public. Under the "rule" established by Western Land Equities, the Owners' right to proceed with their construction "vested" when they obtained a valid building permit, permission to construct on the east portion of their lot, and they undertook

made by the Draper Planning Commission and City Council. Effectively, Owners were precluded from pursuing the state and federal constitutional claims set forth in their verified complaint or from obtaining declaratory or injunctive relief under Utah Code Ann. § 78-33-1 et seq. had the effect of dismissing has filed a motion to dismiss, the sole purpose of which is to cause Plaintiffs' Verified Complaint to be "characterized as an appeal of the City Council's decision with the proceedings going forward as contemplated by Utah Code Annotated Section 10-9-1001." Reply Brief in Support of Motion to Dismiss, at 4. The error in depriving Owners of these remedies, without any hearing on their merits, warrants a reversal of the trial court's ruling on the Motion to Dismiss.

Utah law with respect to motions to dismiss is well established. Such motions may be granted only under extremely limited circumstances. A motion to dismiss "admits all of the facts alleged" in the complaint or petition. Russell v. Standard Corp., 898 P.2d 263 (Utah 1995); St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194 (Utah 1991). Further, it has repeatedly been held that a complaint may not be dismissed for failure to state a claim "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." Christensen v. Lelis Automatic

Transmission Serv., Inc., 467 P.2d 605 (Utah 1970). Moreover, in ruling on a motion to dismiss, the Court must construe the complaint or petition in the light most favorable to the plaintiff and indulge in all reasonable inferences in favor of the plaintiff or petitioner. Russell v. Standard Corp., 898 P.2d 263 (Utah 1995); Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991). It is not required that a complaint spell out in detail all of the grounds upon which relief is sought. It is sufficient if the complaint or petition gives the other party "fair notice" of the nature and basis or grounds of the claim and a "general indication" of the type of litigation involved. Utah Steel & Iron Co. v. Bosch, 475 P.2d 1019 (Utah 1970).

As applied to the present case, the foregoing authorities demonstrate the clear error of the trial court in dismissing several of Owners' claims for relief. Unquestionably, Owners had the statutory right to have the Draper City Council's decision reviewed pursuant to Utah Code Ann. § 10-9-1001. The remedy provided by that statute is only one of several bases upon which Owners are entitled to seek judicial relief from the actions of Draper.

- A. Owners have a direct right of action under Article I § 22 of the Utah Constitution.

In Colman v. Utah State Land Board, 795 P.2d. 622 (Utah 1990) the Utah Supreme Court expressly overturned prior case

law to the contrary and held that Article I § 22 of the Utah Constitution, which states that "[p]rivate property shall not be taken or damaged for public use without just compensation" is "self-executing" and gave rise to a direct cause of action for its violation. *Id.* at 635. The Colman decision also was very clear in establishing the type of interference with property rights that would give rise to a direct claim for a "taking" under Article I § 22: "A 'taking' is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed. " *Id.* at 626. For purposes of this motion to dismiss, the Court must accept as true the allegations set forth in Plaintiffs' Verified Complaint. Russell v. Standard Corp., 898 P.2d 263 (Utah 1995); St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194 (Utah 1991). Those allegations unquestionably establish a *prima facie* showing that the value of Plaintiffs' property has been materially lessened or that their right to its use and enjoyment has been abridged to a very substantial degree. Accordingly, Plaintiffs have a right to assert a "takings" claim under the Utah State Constitution.

B. Owners are entitled to seek Declaratory and/or injunctive relief.

Section 10-9-1001 is not the only Utah statutory basis for Owners' challenge to Draper's decisions affecting their Lot. Pursuant to § 78-33-1 and 2 of the Utah Code Ann. the trial court also had jurisdiction to hear and determine the rights of the Plaintiffs as they have been affected by the decisions of Draper City and its application of the Hillside Ordinance. Reported decisions of the Utah Supreme Court recognize this use of the Declaratory Relief statutes. *E.g. Thurston v. Cache County*, 626 P.2d. 440 (Utah 1981). Plaintiffs have properly alleged this independent grounds for the Court to review the actions of the Draper City Council. See Verified Complaint, [R. at 11-12].

C. Owners also have stated valid claims under the Fifth and Fourteenth Amendments to the United States Constitution.

Obviously, Owners' constitutional protection against uncompensated taking is not limited to the Utah State Constitution. The Fifth and Fourteenth Amendments to the U.S. Constitution also provide bases for challenging governmental actions which deprive property owners of the use, enjoyment or value of their property. See, *e.g.*, First English Evangelical Lutheran Church v. Los Angeles County, 107 S Ct. 2378 (1987). Owners have thus also properly stated a cause of action for

the taking of their federally protected constitutional rights.
See Verified Complaint, [R at 14-15].

D. Owners have stated a claim for relief under 42 U.S.C. § 1983.

Pursuant to the decision of the United States Supreme Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), local governments are deemed to be "persons" who can be sued under § 1983 when an action of the local government causes a deprivation of a constitutionally protected right. It has been held that an improper denial of a building permit was sufficient to state a cause of action under § 1983. See Bello v. Walker, 840 F.2d 1124 (3d Cir.), cert. denied 488 U.S. 868 (1988); see also Jacobs Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) (due process rights arise when plaintiffs have legitimate expectation of a given outcome under applicable zoning laws). In the present case, Owners have alleged that they had a building permit, properly issued by Draper and that they had also received permission from the Draper City Planning Commission to build on the east end of their lot. They have further alleged that all appeal periods pertaining to this decision had expired. Under these circumstances, the Owners had a legitimate expectation and constitutionally protected right to the use and enjoyment of their property, which they have been deprived of by the actions of Draper. Accordingly,

they have stated a proper cause of action under 42 U.S.C. § 1983.

The trial court's implicit dismissal of all Owners' claims for relief (with the exception of their request for judicial review under § 10-9-1001) was improper and inconsistent with the legal requirements for the dismissal of causes of action under Rule 12(b)(6). For this reason too, the trial court must be reversed.

- V. The trial court erred in ruling that Draper City Council's reversal of the earlier decision of the Draper Planning Commission was not arbitrary, capricious or illegal in light of the Council's failure to address the appropriate factors specified by the Draper City's Hillside Ordinance.**

The trial court's review of the Draper City Council's reversal of the permission given to Owners to proceed with construction on their lot is to determine whether such a decision was "arbitrary, capricious or illegal." Utah Code Ann. § 10-9-1001(3). Although the trial court may not substitute its judgment for that of the city council, the council's decision is arbitrary and capricious if not made on the basis of appropriate considerations. See Patterson v. Utah County Board of Adjustment, 893 P.2d 602, 604-05 ("We must determine on the basis of the evidence before the Board, whether a reasonable mind could reach the same conclusion.") Moreover, even if the considerations or reasons given for an action are otherwise legally sufficient, a land use planning decision may

still be arbitrary when the stated reasons lack sufficient factual basis. Davis County v. Clearfield City, 756 P.2d 704, 711 (Utah App. 1988).

The Draper Hillside Zoning Ordinance identifies three specific factors that need to be considered when application is made to building on slopes of 30% or more. These factors are:

- (1) No significant harm will result;
- (2) The proposed modification will result in a more functional and improved plan; and
- (3) The developer / builder agrees to comply with any conditions and requirements imposed by the Planning Commission to mitigate any adverse effects which may result from the proposed modification.

Section 9-15-4(a) Draper City Hillside Ordinance. Ex. 7 at Section 9-15-4. The decisions of the Planning Commission to allow Owners to proceed with construction on the east end of their Lot ~~were~~ based on a consideration of these factors. See Ex. 10A at 9-10. In overturning those decisions, however, the Draper City Council in its meeting of June 13, 1995, failed to base its decision on any of these factors. Instead, the Council focused on concerns voiced by neighbors as to potential effects upon their views, and the prices they had paid for their lots. Moreover, the City Council improperly limited Plaintiffs' opportunity to be heard at the meeting before making its decision. [R. at 297]. Because the stated grounds for Draper City Council's decision were not proper under the relevant statute, the decision was arbitrary and

capricious and should have been overturned. The trial court should be reversed on this point.

VI. The decision of the Draper City Council to reverse the earlier decision of the Draper City Planning Commission based on "public clamor" rather than a consideration of the appropriate decision-making factors.

In several reported decisions, the appellate courts of Utah and other states have held that "public clamor" is not an adequate basis for land use planning decisions. In Davis County v. Clearfield City, 756 P.2d 704, (Utah App. 1988), the Utah Court of Appeals held that although "sentiments [of neighboring landowners] may be weighed in a zoning decision, they may not be the sole basis for granting or denying a given permit." *Id.* at 712 quoting City of Barnum v. County of Carlton, 386 N.W. 2d 770 (Minn. Ct. App. 1986). As the court further explained:

[The] decision appears to have been merely a response to public opposition. This is an insufficient basis upon which to deny a conditional use permit. A county must rely on facts, and not mere emotion or local opinion, in making such a decision.

Similarly, in Thurston v. Cache County, 626 P.2d 440, 445 (Utah 1981), the Utah Supreme Court also indicated that "the consent of neighboring landowners may not be made a criterion for the issuance or denial [of] a conditional use permit."

It is readily apparent that, just as in the Davis County case, the only real basis for Draper City Council's reversal

of the decision to allow Owners to proceed with the construction on the east end of their lot was the objection of neighboring landowners who were concerned about possible impact on the views from their lots or (even important) the fact that Owners had paid less for their Lot than these neighbors had and that it was somehow unfair for Owners to obtain a good view without having paid for it! Ex. 10C at 38-39. None of the concerns expressed on the record at the June 13, 1995 meeting of the Draper City Council provides an appropriate basis for the reversal of the planning commission's decision to allow Owners to proceed with construction on their Lot. Instead, the decision clearly appears to have been based on nothing more than opposition by non-contiguous neighbors. Such "public clamor" does not--as a matter of law--provide a legally sufficient basis for zoning decisions. Draper's actions in stopping construction on Owners' Lot were therefore arbitrary and capricious and should have been reversed by the trial court.

VII. The trial court erred, in light of its express finding that the Draper City Planning Commission granted permission to Appellants to proceed with construction on the basis of a mutual mistake of fact (with no bad faith or deceit on the part of Appellants) in determining that Draper had the authority and right to reconsider the planning commission's earlier action.

To a very substantial degree, the trial court's ruling in this case that Draper could re-open the issue of Owners'

construction on their Lot was based on its finding that the planning commission's earlier decision had been based upon a mutual mistake of fact -- the assumption by all parties that the neighbors who had previously expressed concerns about Owners' plans for their Lot no longer objected. Because it found the decision of the Planning Commission to have been based upon that mutual mistake, the trial court did not enforce the jurisdictional limit imposed by the appeals deadline, did not find that Owners had a vested right to proceed with development of their Lot and did not find that Draper was equitably estopped from halting Owners' construction on their Lot. [R. at 224-25]. There is no question that Owners acted in good faith in obtaining permission from the planning commission to proceed with construction. Indeed, the trial court made a specific finding that Owners had not acted in bad faith. Thus, the question raised by this case is the legal effect of land use decision made on the basis of a good-faith, mutual mistake and relied upon by Owners.

There is no law on this issue in the State of Utah. Other jurisdictions have issued decisions in similar circumstances that support the right of Owners to proceed with construction once they have relied in good faith on a mistakenly granted zoning decision. In Commonwealth v. Flynn 344 A.2d 720 (Comm. Ct. Pa. 1975), for example, the court

ruled that a property owner's good faith reliance on a permit issued by a municipality should afford him a vested right to complete construction, even though the building permit was issued in error. Significant factors that the court found to support this decision were: (1) the time to appeal the decision to issue the permit had expired; (2) there was no evidence that public health, safety or welfare would be adversely affected by the use of the permit; (3) the owner acted in good faith; and (4) the owner had spent a substantial amount of unrecoverable funds that would be "wasted" in detrimental reliance on the validity of the permit. 344 A.2d at 724-25. Each of these factors is also found in the present case.

Similarly in Aranosian Oil Co. v. City of Portsmouth, 612 A.2d 357 (N.H. 1992) the Supreme Court of New Hampshire ruled that a zoning board could not reverse an earlier decision allowing a property owner to proceed with renovations on its property on the basis of an error by a zoning official in reviewing the zoning application. Once again in this case, the Court found persuasive the fact that the owner had spent approximately \$45,000 in making renovations under the zoning permit.

For precisely the same reasons set forth in these decisions, Owners should be allowed to complete the construction of the home on their Lot. The time for appealing

the planning commission's decision had run prior to Owners' expenditure of funds to pour their foundation. The Owners' reliance on the planning commission decision was made in complete good faith. No harm to public health or safety will result from a decision to allow Owners to proceed.³ The Owners' good faith reliance on the earlier decision of the planning commission has cost them approximately \$50,000, which amount will be completely wasted if the construction is halted. To avoid this inequitable result, the decision of the trial court should be reversed and Owners should be allowed to complete construction of their home.


CONCLUSION

On the basis of the foregoing cases and authorities, Owners respectfully request that this Court reverse and, as appropriate, remand this matter for further proceedings consistent with the established Utah precedent upon which they rely.

Dated this 17th day of September, 1996.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

By: _____

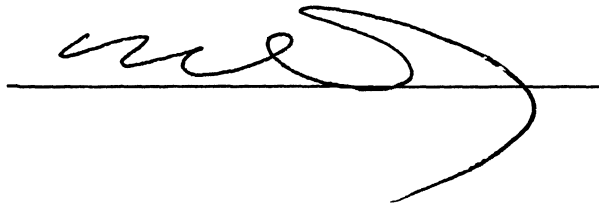

Mark E. Wilkey
Gregory D. Phillips
Attorneys for Appellants

³ If construction is halted at its present state, however, there may be a dangerous and unsightly condition in which a partially completed foundation is left "sticking out" of the top of the sloped lot.

CERTIFICATE OF SERVICE

On the 17th day of September, 1996, a true and correct copy of the foregoing was served via United States mail, first class postage prepaid on the following:

Michael Z. Hayes, Esq.
Mazuran & Hayes
1245 East Brickyard Road, #250
Salt Lake City, UT 84106

A handwritten signature in black ink, appearing to be 'mz hayes', is written over a horizontal line.